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In The

Supreme Court of the United States

October Term, 1993

ROBERT FERRO,

Petitioner,

vs.

CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal State Of California Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a challenge to the prosecutorial systematic exclusion of trial jurors in a state criminal trial on racial grounds, where the trial court directs the prosecutor to justify the reasons for peremptory challenges, can the obligation be met and satisfied by a prosecutorial response that fails to reach the merits of the reasons for removal and is directed solely to a contention that no recognized group is being removed within the meaning and import of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69?

2. Whether, under *Batson v. Kentucky,* supra, petitioner, of Latin descent, was denied his rights under the Sixth and 14th Amendments by removal from his petit jury panel in a state criminal trial two young female Hispanics and one young female Black by a state prosecutor where the prosecutor failed to explain whatsoever the reasons for the removal after being requested to do so by the court?

3. Whether a state appellate court can neglect and refuse to rule upon violations of the Fourth and 14th Amendment rights of a state criminal defendant in an opinion of that state appellant court where such violations are duly and timely raised pre-trial, during trial, and upon appeal from the conviction?

4. Whether this Honorable Court must command state appellate courts to resolve and to rule on all allegations of violations of rights to criminal defendants under the Fourth Amendment to the U.S. Constitution which are raised in the direct appeal?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Robert Ferro, petitioner, seeks a writ of Certiorari to the Court of Appeal of the State of California for the Second Appellate District from the opinion entered December 20, 1993, hearing denied March 23, 1994 by the Supreme Court of California.

OPINION BELOW

The Court of Appeal of the State of California, Second Appellate District, entered its opinion certified for partial publication, *People v. Robert Ferro,* on December 20, 1993. A timely petition for Review was denied on March 23, 1994 by the Supreme Court of California. Copies of these opinions and orders appear in the Appendix, A-1 and B-1, respectively.

JURISDICTIONAL GROUNDS

(i) The Court of Appeals of the State of California affirmed the conviction of petitioner by an opinion certified for partial publication entered December 20, 1993. A copy of that opinion appears at Appendix A-1. The official citation is *People v. Ferro,* ___ Cal.App.4th ___.

(ii) The Supreme Court of California entered an order denying review on March 23, 1994. A copy of that order appears at Appendix B-1.

(iii) Jurisdiction to review by certiorari a decision of a state court of last and highest resort in a criminal case is provided under 28 U.S.C. 1257.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Robert Ferro, of Latin extraction, was tried in the Superior Court of California for the County of Los Angeles on several offenses involving the reckless possession of explosives.

A. THE SYSTEMATIC REMOVAL OF YOUNG, FEMALE, BLACK AND HISPANIC JURORS WITHOUT COMPLIANCE WITH *BATSON V. KENTUCKY*, 476 U.S. 79.

During the jury selection the prosecutor, herself a Mexican-American, systematically removed by peremptory challenge young female prospective jurors of both Black and Mexican descent, ultimately bringing before the Court a defense challenge to that use of the peremptory challenge. The challenge process was made on the basis of *People v. Wheeler* (1978) 22 Cal.3d 258, a predecessor of this Honorable Court's treatment of the subject in *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712.

The challenge, made after this class of young, minority females were removed, took the form:

> "The defense for the record would lodge a Wheeler type objection, or perhaps the better way to couch it now is to just make an option that the government is using its premps in a discriminatory way or a way to exclude a particular class of individuals.
>
> In this case it would be joining female women from minority groups . . .

> Premp number one was Miss Molina who appeared to be a fine juror in every other way other than she was a Latin surnamed individual, Molina, a relatively young female . . . And then a Miss Darrington, also single, as was Miss Molina. Miss Darrington appeared to be 30-ish, a black female, member of the minority group. Then the third one is Miss Alvarez, also single. Perhaps mid 20's, female, minority group. Alvarez was her last name. She appeared to be Latin.
>
> Point being that the prosecution has used three of four premps to exclude three – otherwise seemingly good jurors on class of individual, here, *young female,* relatively young, *from minority groups.* And since my client has a surname which is Latin, it would appear as though at least the Court could inquire into her motivation, perhaps her reasons at least. The threshold requirement I feel has been made for a Wheeler type of objection. So we would log it and ask for a mistrial."

The Court then invited the prosecutor to respond, whereupon the prosecutor said:

> "I don't believe, first of all, that counsel has made a suspect class. He has two women of – two Hispanic women, one old, one young, one black woman who appears to be middle aged and one man who is white. I don't see a group there by any stretch of the imagination that can be called a *suspect group.* It is not one particular minority. It is not one particular sex. It is nothing. It is not one particular age. *I don't think age or sex* is a *suspect class,* anyway. I think the only *suspect class* is minority *grouping* and I think we have two Hispanics, one Black, and one White."

Upon this response from the prosecutor, the trial judge responded:

> "I think there is a recent case that has come down involving gender, but I concur with the People at this point. There doesn't appear to be a pattern of systematic exclusion. The record should reflect at least at this point that there are two additional Hispanic or Spanish surname jurors. They are Juror Number Six, Cisneros; Juror Number Seven, Miranda. The objection is overruled."

Counsel for petitioner Ferro pressed his point that the removal was, inter alia, directed to young female Latins, and that petitioner Ferro, the defendant, was of Latin extraction:

> " . . . Miss Cisneros and Miss Miranda are obviously – I hope I don't get into trouble, but perhaps in their 50's, perhaps mid 50's, and if I wasn't clear, not only does the motion go to gender and the class, but also Latins, Molina and Alvarez are clearly in that class. And my client being Latin is – Motion is made on that as well . . . "

The prosecutor, a Ms. Najera, then commented:

> "For the record, as the prosecutor is Mexican, so I don't know what all that means."

The Court terminated the challenge without obtaining from the prosecutor her reasons for the peremptory challenge to the jurors of young, female and minority class by a terse:

> "The motion for mistrial is also denied." (pages 202-204, Reporter's Transcript on Appeal)

In reviewing the challenge to the dismissal of the young, female minority (black, Hispanic) jurors, the governing case of this Honorable Court, *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 was never even mentioned by the California Court of Appeals for the Second Appellate District. (See Appendix A, pages A-3 through A-11). The reviewing Court confined itself to a seriatim of State decisions that had either reversed or affirmed convictions where peremptory challenges had been systematically exercised against alleged classes of jurors.

The California Court of Appeals noted, however, that

> "Here, the prosecutor offered no justification for the peremptory challenges, but addressed only the question of whether a prima facie showing had been made."

At no time did the California Court of Appeal measure the challenge under the criteria of *Batson v. Kentucky*, supra.

B. THE FAILURE/REFUSAL OF THE CALIFORNIA COURT OF APPEAL TO ADDRESS THE MANIFOLD CHALLENGES TO DEPRIVATION OF FOURTH AMENDMENT RIGHTS TO PETITIONER FERRO.

Petitioner raised several independent and also interrelated Fourth Amendment deprivations, ranging from a planned and premeditated arrest within his home without an arrest warrant in violation of *Payton v. New York* (1980) 445 U.S. 573, falsification of the search warrant affidavit within the meaning of *Franks v. Delaware* (1978)

438 U.S. 154, and absence of probable cause to believe that items of explosive nature would be found in his private home and business when the falsified items were removed from the affidavit.

In this most unusual Court of Appeal of California opinion, the Court refused to discuss, analyze, and rule upon the great majority of the assailed deprivations.

Thus petitioner raises as a significant issue on Certiorari whether a state Court of Appeals can willfully refuse to consider and rule upon all issues raised under the Fourth and 14th Amendments to the United States Constitution, an issue made significant since the weight of authority in California Habeas Corpus law precludes raising search and seizure issues where the defendant has had a forum that has decided the issues at the trial level and they have been reviewed by the appellate system. See, e.g. *In Re Terry,* 4 Cal.3rd 911 citing a host of state predecessor authorities; and, of course, such collateral Fourth Amendment attack is generally handled by federal courts under *Kaufman v. United States,* 394 U.S. 217; see also *Mancusi v. De Forte,* 392 U.S. 364.

What then must be the requirement from this, the Nation's Highest Court, where the state reviewing Court on the direct appeal neglects and refuses to determine these Fourth Amendment deprivations?

It is asserted that on Petition for Rehearing in the California Court of Appeal and in the sought Review before the Supreme Court of California this issue was placed before both the above Courts and neither Court, in denying further consideration at the state level, would

rectify the omitted resolution by the Court of appeal in Appendix A-1.

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. To further explicate the boundaries of prosecutorial removal of minority race, age and gender oriented petit jurors by the peremptory challenge within the meaning of *Batson v. Kentucky* (1986) 476 U.S. 79.

2. To resolve, on a national basis, whether state courts of appeal, in reviewing state criminal convictions, can refuse and neglect to resolve defense challenges to denials of rights under the Fourth and 14th Amendments raised in those appeals.

ARGUMENT I

THE COMMANDS OF THIS HONORABLE COURT IN *BATSON V. KENTUCKY*, 476 U.S. 79 WERE NOT HONORED BY THE TRIAL AND APPELLATE COURTS OF CALIFORNIA IN RESOLVING THE 6TH AND 14TH AMENDMENT DEPRIVATION OF RIGHTS TO A CROSS-SECTION JURY AND ABDICATION OF THAT RIGHT TO PETITIONER FERRO, OF LATIN EXTRACTION, BY REMOVAL OF YOUNG, FEMALE, MINORITY RACE JURORS BY THE PEREMPTORY CHALLENGE.

This Honorable Court has succinctly stated the ground rules that are to govern review of a claimed purposeful racial discrimination in selection of petit juries by prosecutors. In overturning the previous governing case allowing such challenges, *Swain v. Alabama*,

380 U.S. 202, this Court held in *Batson v. Kentucky*, 476 U.S. 79, 96 that to establish such a purposeful racial discrimination case the defendant had to:

> 1. (a) First show that he is a member of a cognizable racial group, and
>
> (b) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.
>
> 2. Secondly, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate," and
>
> 3. Finally the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

At bar, petitioner, via his counsel, showed that he, Robert Ferro, was of Latin extraction and that the female prosecutor exercised three of her first four peremptory challenges against two relatively young Mexican females and one young black female; at this time defendant's counsel challenged the process, which ended with the Court observing, in denying the challenge, that the panel at that time yet contained two additional "older" Mexican females.

However, the error, and deprivation to petitioner, was cemented by the Court inviting the prosecutor to explain the removal, if she could, for the three younger females, and two of the three being from petitioner Ferro's Latin extraction. This request was circumvented

by an assertion that female jurors of mixed races did not constitute a recognized group, i.e., the fact that the 3 removed were 2 Mexicans and 1 Black allegedly negated the contention that petitioner, of Latin descent, was being deprived of a jury from which *only* his racial background was being pared.

Essentially the prosecutor's response was that there was no need to go to the merits of the removal since no discernible group was shown to have been removed.

Petitioner asserts error here, for this Court has held that once the showing has been made "the burden shifts to the State to come forward with a neutral explanation for challenging" these jurors. (476 U.S. 79, 97).

Petitioner asserts that relatively young female jurors of general, or mixed, minority groups constitute a class of jurors, and a defendant is entitled to protection from the unexplained removal of 2 young females of his Latin extraction and one of the Black race. Indeed, since Whites are entitled to protection against systematic removal of Blacks, and vice-versa, petitioner is to be protected from the systematic removal of both Latin and black jurors, and since female jurors are a recognized class, as are younger jurors, petitioner demonstrated such a pattern, requiring an "on the merits" explanation.

A response dodging the merits of explanation for this racially oriented removal, directed toward arguing that no discernible group was demonstrated, misses the mark and the requirements of this Court in *Batson v. Kentucky*, 476 U.S. 79, 96-97:

The prosecutor is admonished that once the Court requests a response, the prosecutor cannot:

> (a) rebut the defendant's prima facia case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption or his intuitive judgment that they would be partial to the defendant because of their shared race;
>
> (b) deny that he had a discriminatory motive or "affirming his good faith in making individual selections."

Indeed, this Court then held that:

> The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.

Once that response is made,

> The trial court then will have the duty to determine if the defendant has established purposeful discrimination.
>
> (476 U.S. 97, 98)

At bar, however, the prosecutor took another tack to avoid the required responsive explanation; that approach was to deny that the "group" consisting of 2 young Mexican females and one black female, tossed in with a white male, was either discernible or recognized by existing authorities; the Court, however, transiently noted that "gender" discrimination was recognized, but proceeded to revert to a non-merit position, i.e., that there "did not appear to be a pattern of systematic exclusion," since "there were two additional Hispanic or Spanish

surname jurors" that had, at that time, not been removed by peremptory challenge.

And, the prosecutor did offer the explanation that, after all was said and done, *she* was "Mexican." It is, perhaps, unclear whether having a Mexican female prosecutor for a Mexican defendant neutralizes the removal of young female Mexican jurors from the petit jury panel.

Petitioner asserts that once the prosecutor is requested to respond to the challenged removal, an answer cannot take the form that there was no group recognized by the authorities that was here removed, for this illegally circumvents the requirement of a "neutral explanation related to the particular case to be tried."

The California Court of Appeals suggests an ambiguity existed in the Court's requested response, i.e., did the Court want a response (a) to whether a "pattern of systematic exclusion" had been demonstrated, or (b) to why the prosecutor had challenged the 2 female Mexicans and 1 female Black?

However, this "ambiguity" should not be logical, for the former is really an issue for the Court itself without required prosecutor response, while the latter would surface if and only if the Court had first decided that the threshold showing had been made under the above triad of this Honorable Court in *Batson* at 476 U.S. 79, 96. In requiring a response to the above Batson triumvirate, the trial Court has not looked to any input by the prosecutor, but has requested the response based totally and only on *acts* of the prosecutor, the race of the defendant, and the race of the removed jurors; if the response is *requested*, it must be because the Batson triplet has been established in

the mind of the Court, and there can be no ambiguity. Certainly such an "ambiguity" should not be resolved against the criminal defendant who is the one being granted the protective mantle of Batson by this Honorable Court.

Petitioner thus asserts that, quite apparently, the 3 level criteria of Batson yet appear esoteric to some Courts, and especially an appellate Court bent upon upholding a criminal conviction by resolving an alleged "ambiguity" of the trial Court's state of mind against the criminal defendant.

Likening the Court-prosecutor colloquy in the Batson process in this case to the "bouncing ball" of, perhaps, a Las Vegas, Nevada roulette wheel, landing in either red or black, by chance, the California Court here allowed the ambiguous and sporadic sphere to land in favor of the State of California and against this petitioner, while prophesying that "next time" it well might land in the slot of the defendant, lest the prosecutors and the trial courts persist in their "ambiguous behavior" during a Batson challenge process.

Petitioner asserts that the Batson process, and this Honorable Court's 3-fold rules to challenge racial removal of petit jurors, cannot suffer from "ambiguity" and may not be likened to an erratic bouncing ball; if that "ambiguity" truly exists, it must be resolved here in favor of the petitioner and a conclusion that the 3 tier Batson criteria were neither honored nor properly applied, as they should have been, in favor of this petitioner.

In view of the above significant national need to clarify and illuminate the Batson challenge rules, Certiorari should be granted to the Court of Appeal of the State of California for the Second Appellate District.

ARGUMENT II

IN PRE-TRIAL MOTIONS AND ON APPEAL FROM THE SINGLE CRIME CONVICTION, PETITIONER FERRO RAISED AND ASSERTED VIOLATIONS OF HIS RIGHTS TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION. ON THE DIRECT APPEAL WHERE THESE RIGHTS WERE RAISED AS ERRORS MADE BY THE TRIAL COURT, THE CALIFORNIA COURT OF APPEALS REFUSED AND NEGLECTED TO RESOLVE AND RULE ON THE ASSERTED ERRORS, THUS DEPRIVING PETITIONER ONCE AGAIN HIS FOURTH AMENDMENT PROTECTION. CERTIORARI SHOULD BE GRANTED TO SET NATIONWIDE COMMAND AND GUIDELINES TO STATE APPELLATE TRIBUNALS TO REQUIRE RESOLUTION ON THE MERITS OF ALL FOURTH AMENDMENT CLAIMS IN THE DIRECT APPEAL.

Petitioner Ferro seeks Certiorari to raise and resolve a nationally consequential issue:

> Where a state denies and disenables from raising Fourth Amendment violations in petitions for Writ of Habeas Corpus, and requires that said alleged errors be raised only in direct appeal, can a state Court of Appeal and the Supreme Court of that state refuse and neglect to resolve those Fourth Amendment violations

> in the direct appeal and in the opinion of the state Court of Appeal?

The State of California disallows its criminal defendants from raising alleged deprivations of their rights under the Fourth and 14th Amendments in Petitions for Writ of Habeas Corpus; those alleged deprivations may be only challenged on direct appeal from the conviction, and not on collateral attack.

This is well established in a seriatim of decisions of the California Supreme Court summarized in the Habeas Corpus petition *In Re Terry*, 4 Cal.3rd 911, 926, 95 Cal.Rptr. 31, 484 P.2d 1375 (1971):

> Terry contends that evidence introduced at his guilt trial was obtained by assertedly illegal searches and seizures. The writ is not available to attack a final judgment on this ground. (*In Re Malloy*, 66 Cal.2d 252, 255 (57 Cal.Rptr. 345, 424 P.2d 929); *In Re Wright*, 65 Cal.2d 650, 652 (56 Cal.Rptr. 110, 422 P.2d 998); *In Re Lokey*, 64 Cal.2d 626, 632 (51 Cal.Rptr. 266, 414 P.2d 394); *In Re Sterling*, 63 Cal.2d 486, 487 (47 Cal.Rptr. 205, 407 P.2d 5); *In Re Lessard*, 62 Cal.2d 497, 503 (42 Cal.Rptr. 583, 399 P.2d 39)).

While the California High Court noted that, at that time, illegal searches and seizures could be raised by either a state or federal prisoner in a collateral federal proceeding, citing *Kaufman v. United States*, 394 U.S. 217, 218 and *Mancusi v. De Forte*, 392 U.S. 364, the High Court of California said "We need not afford a cognate collateral remedy in the state court." (4 Cal.3rd 911, 926-927, supra).

This truncation of rights to state prisoners in California, disenabling the use of Habeas Corpus to attack Fourth Amendment asserted violations, places the only allowable focus on the direct appeal. However, what should be the remedy to a criminal defendant in such a state, as here in California, where the issues are raised in pretrial motions, resolved against the criminal defendant, are then re-raised on appeal from the conviction, but, as here, the reviewing California Court of Appeal refuses and neglects to resolve these issues?

In his direct appeal opening brief Petitioner Ferro raised all of the following Fourth Amendment issues, citing directly from that opening brief:

QUESTIONS/ISSUES ON APPEAL

1. Whether the search warrant issued to search the socalled chicken processing plant stated probable cause within the meaning of *Illinois v. Gates*, 462 U.S. 213 (1983)?

2. Whether the search warrant issued to search the private home of appellant on Tapia Way in Upland stated probable cause within the meaning of *Illinois v. Gates*, 462 U.S. 213 (1983)?

3. Whether any search warrant provided for the seizure of appellant's person, and thus whether appellant's person could be seized within his private domicile, and whether all fruits of that illegal seizure such as any statement/admission must be suppressed within the meaning of *People v. Ramey* (1976) 16 Cal.3rd 263, and *Payton v. New York* (1980) 445 U.S. 573, 583-603?

4. Whether the Court failed to afford a full and complete hearing under *Franks v. Delaware* (1978) 438 U.S. 154, in allowing the 5th Amendment to be taken by the informant Jamie Gar Wolden to questions that would be restricted to showing willful or reckless material misstatements and omissions by the affiant in the search warrant affidavit and thus not incriminating to Wolden?

5. Whether the Court erred in failing to allow defense investigator David Albright to testify, at a *Franks* hearing, to statements made by Jamie Gar Wolden where the issue was the material misstatements and omissions of the search warrant affidavit?

6. Whether David Albright was a competent witness to the issue of appellant's guilt under *People v. Spriggs*, 60 Cal.2d 868, and *Chambers v. Mississippi* (1975) 410 U.S. 284?

7. Whether appellant was denied the effective assistance of counsel at his trial and pre-trial, within the meaning of *People v. Pope*, 23 Cal.3rd 412, 425-427 by the failure to challenge the seizure of his body under the search warrant and in failure to urge the calling of the defense investigator David Albright under Spriggs-Chambers?

8. Whether the only item justifying any nexus to the private abode, an alleged viewing of $250,000 cash there at, at a non-named time, by Wolden, was (a) stale, or (b) non-specific as to time, within the meaning of *Alexander v. Superior Court* (1973) 9 Cal.3d 387?

9. Whether the viewing of $250,000 at the home, even if true, at a non-named time, provided probable

cause to search appellant's private home under the facts of this case?

10. Whether, if that statement was false, i.e., that Wolden did not so state to the affiant who authored the incorporated police report, there was any nexus to support a bare allegation that items were currently located at the private home of appellant Ferro, many miles from the so-called chicken processing plant?

11. Whether *United States v. Leon* (1984) 468 U.S. 897 and its "good faith" rule can save the warrants in this case?

Of these 11 issues and questions, all dealing with significant and relevant Fourth Amendment rights and asserted deprivations, only the question of whether appellant's attack of the search warrant under *Franks v. Delaware*, 438 U.S. 154 (1978) was discussed at section II, A-11 through A-15 and at section III, A-15 through A-19. Replete in that analysis is the overt or inferential conclusion of the California Court of Appeal that the informant on the search warrants, one Jamie Wolden, was not reliable and that the trial court was justified, because of Wolden's personal Fifth Amendment rights, in not forcing Wolden to testify in support of petitioner Ferro's assertion that perjured allegations were contained in the affidavits to secure the search warrants for petitioner's abode and closed-down "chicken processing plant."

Unresolved and not even discussed were the attack of the validity of the warrants under *Illinois v. Gates* (1983) 462 U.S. 213 and *United States v. Leon* (1984) 468 U.S. 897, and the arrest of petitioner at his private residence without arrest warrant per *Payton v. New York*

(1980) 445 U.S. 573, where the same untested, unknown informant, Jamie Wolden, was clearly shown to have no credibility-reliability-veracity prong under *Aguilar v. Texas*, 378 U.S. 108 and *Spinelli v. United States*, 393 U.S. 410, and *had been shown to lie to police on the key issue of where he, Wolden, had obtained the small portion of the explosive "C-4" even before the police had obtained the warrants.* See Appendix A-11-A-12, Section II first 2 paragraphs, the Court noting that Wolden initially said that he had acquired the "C-4" at a golf course (paragraph 1) and then altered the story to claim he had acquired it at the "chicken processing plant." (paragraph 2).

No verification of Wolden's altered story was made before the warrants were obtained and executed, and it is here evident that the deficient Aguilar-Spinelli affidavit rose no higher than these defects under the "totality of circumstances" test of *Illinois v. Gates*, 462 U.S. 213 (1983), but the California Court of Appeals refused/neglected to resolve these key search and arrest warrant attacks and issues.

In a like manner, since Wolden himself had told defense investigator David Albright that petitioner was innocent, Albright was a competent witness under the rule of this Honorable Court in *Chambers v. Mississippi* (1975) 410 U.S. 284 and the California counterpart to Chambers, *People v. Spriggs*, 60 Cal.2d 868, but that issue was circumvented by the California Court of Appeal.

And, of course, since all of the foregoing issues were eliminated, the California Court of Appeal did not resolve any "good faith" of police affiants under *United States v. Leon* (1984) 468 U.S. 897.

Petitioner asserts that his rights under the Fourth and 14th Amendments have been denied by the California Court of Appeal in their refusal to resolve these significant issues.

Certiorari should be granted to set standards for state appellate courts, commanding them to resolve such significant issues, and at least assert that they have considered them and found them to be non-meritorious. Otherwise, as here in California, a criminal appellant cannot secure relief whatsoever because he or she is precluded in seeking the relief in habeas corpus.

This significant due process deprivation should cause the grant of this petition for Certiorari to the California Court of Appeal.

CONCLUSION

Certiorari should be granted to further define the rules of prosecutorial elimination of minority race jurors by the peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79.

Certiorari should also be granted to resolve the key national issue whether state appellate courts can refuse and neglect to resolve, in a direct state appeal, asserted deprivations of rights under the Fourth and 14th Amendments to state criminal defendants.

Respectfully Submitted,

ROGER S. HANSON
Counsel to Petitioner
ROBERT FERRO
Member of bar
U.S. Supreme Court

APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT FERRO, Defendant and Appellant.	No. B070286 (Super. Ct. No. KA00927) (Filed Dec. 20, 1993)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Martinez, Judge. Affirmed.

Hector C. Perez, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George H. Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, David F. Glassman and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II through V.

We affirm defendant's conviction of a violation of Penal Code section 12303.2, prohibiting possession of "any explosive on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, cable road or cable car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings. . . . "

BACKGROUND

Jamie Wolden was found in possession of a small amount of explosive known as C-4, arrested, and taken to the Baldwin Park Police station. Sheriff's deputies responded and, after further investigation, secured search warrants for defendant Robert Ferro's home and an abandoned chicken processing plant owned by him. Deputies found five pounds of C-4 in a cabinet in an office in the chicken plant. At the same time, other deputies served the search warrant at defendant's home, where he was detained during the search. After being notified that C-4 was found at the chicken plant, deputies at the home arrested defendant.

The defense attempted to pin possession of the chicken plant C-4 on Wolden. Defendant denied it was his.

Charged with three separate counts involving possession of prohibited materials, defendant secured pretrial dismissal of one count and successfully moved to suppress the results of the search of a pickup truck in which prohibited materials were found. The jury acquitted him of another count and convicted him of a single count of

possession of an explosive under Penal Code section 12303.2.

On appeal, defendant presents several claims, including error during jury selection, improper exclusion of defense evidence, insufficiency of evidence, and ineffective assistance of counsel.

DISCUSSION

I

During jury selection, defense counsel raised the point of systematic exclusion and concluded his remarks thus: " . . . it would appear as though at least the court could inquire as to [the prosecutor's] motivation, perhaps her reasons, at least. The threshold requirement I feel has been made for a *Wheeler* type of objection. So we would log it and ask for a mistrial." The trial court asked the prosecutor, "Do you wish to be heard, counsel?" She replied, "Just briefly, Your honor. [¶] I don't believe, first of all, that counsel has made a suspect class. He has two women of – two Hispanic women, one old, one young, one Black woman who appears to be middle aged and one man who is White. I don't see a group there by any stretch of the imagination that can be called a suspect group. It is not one particular minority, it is not one particular sex. It is nothing. It is not one particular age. I don't think age or sex is a suspect class, anyway. I think the only suspect class is minority grouping and I think we have two Hispanics, one Black and one White." The trial court replied, "I think there is a recent case that has

come down involving gender, but I concur with the People at this point. There doesn't appear to be a pattern of a systematic exclusion." (Emphasis added.)

The question is whether the above means the trial court made a prima facie finding of systematic exclusion. If it did, the conviction must be reversed. "Once a prima facie case has been shown, the burden shifts to the prosecutor to show that the jurors in question were legitimately excused. [Citations.]" (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1192.) Here, the prosecutor offered no justification for the peremptory challenges, but addressed only the question of whether a prima facie showing had been made.

"In the absence of an express prima facie finding, reviewing courts have implied this initial finding through the actions of the trial court." (*People v. Gonzalez, supra,* 211 Cal.App.3d at p. 1196.)

In *Gonzalez,* the trial court's response to the *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258) was, " *'All right. I'll ask the District attorney to give me reasons for the exclusion of those two prospective jurors. Miss M*[ ]? [']" (*People v. Gonzalez, supra,* 211 Cal.App.3d at p. 1195.) The prosecutor replied with a somewhat detailed, but insufficient, justification of her exercise of peremptory challenges. The appellate court found the trial "court's request for reasons of exclusion presupposed an implied finding that the prima facie evidence existed. Otherwise, there was no reason to request explanations. The prosecution should not be obligated to justify peremptory challenges unless the court has found that prima facie evidence of improper exclusion exists. By asking the

prosecutor to give reasons for her challenges, the court impliedly made the requisite prima facie finding of systematic exclusion, thus shifting the burden to the prosecutor to justify the challenges." (*Id.* at p. 1198.)

In *People v. Turner* (1986) 42 Cal.3d 711, the trial court responded to the defense *Wheeler* motion by asking the prosecutor, " 'Mr. Martin, would you like to explain?' [The prosecutor offered reasons.] . . . [¶] . . . It follows that unless the trial court . . . had made at least an implied finding of group discrimination, it would have had no basis for asking the prosecutor to 'explain' the reasons for his peremptory challenges. . . . Indeed, after *Wheeler* it is disingenuous to treat such inquiries as anything else." (*Id.* at pp. 718-719; see also *People v. Trevino* (1985) 39 Cal.3d 667, and *People v. Hall* (1983) 35 Cal.3d 161.)

"In *People v. Granillo* [(1987)] 197 Cal.App.3d 110, the trial court 'invited the prosecutor to respond' to the defense's *Wheeler* motion. (*Id.* at p. 117.) [The prosecutor attempted to justify the peremptory challenges.] 'This invitation arguably constituted an implied finding of a prima facie showing.' (*Ibid.*) *Granillo* held that if the justifications 'are heard at this early stage in the process an undoubtedly unintended implication arises that a prima facie showing has been made to the satisfaction of the court.' (*Id.* at p. 122.) *Granillo* also explained that such an implication was unnecessary since the court later made an express prima facie finding." (*People v. Gonzalez, supra,* 211 Cal.App.3d at p. 1197.)

In *People v. Cervantes* (1991) 233 Cal.App.3d 323, a spousal abuse case, the defense accused the prosecution

of systematically excluding White men from the jury. The trial court asked the prosecutor to respond and he argued that White men were not a cognizable group. After further colloquy, the prosecutor denied he was systematically excluding anyone. The court invited him to state his reasons for dismissing the individual jurors involved. The prosecutor objected, but said he would if so ordered. The trial court replied, " 'Well, I think – I am not granting his motion, but I think for the record it would be beneficial to have that on there.[']" (*Id.* at p. 328.) The prosecutor then "fell into the common trap of responding with specific reasons for exercise of his peremptories in response to the trial court's request that he do so *without the court making a finding that a prima facie showing of discrimination has been established.*" (*Id.* at p. 335.)

Under the circumstances, the *Cervantes* appellate court concluded the trial court had impliedly made the prima facie finding and the prosecutor had failed to adequately explain. The problem "could have been avoided had the district attorney demanded a specific finding of the trial judge. Although not an excuse, we understand that trial lawyers, including deputy district attorneys, often are reluctant to make demands of the trial judge for such things as specific findings, etc. However, at least as to *Wheeler* motions, the district attorney need never be put in this position. When defense counsel makes a *Wheeler* motion and states his reasons for the motion, if the trial judge, after weighing and evaluating these reasons, concludes a prima facie showing of discriminatory exclusion of a cognizable group has not been made, then the judge must clearly and succinctly say so, state his or her reasons, and make the necessary finding

of no prima facie showing. On the other hand, if the court concludes a prima facie showing has been made, then it must state that finding. Either way, the district attorney knows where he or she stands and what must be done, i.e., either respond or not, depending on the court's specific finding. And, of course, had the above-described scenario been followed here, then *Wheeler* error may have been avoided." (*People v. Cervantes, supra,* 233 Cal.App.3d at pp. 336-337, fn. omitted.)

In *People v. McCaskey* (1989) 207 Cal.App.3d 248, the trial court's invitation to the prosecutor was simply, " 'Ms. Begen?[']" (*Id.* at p. 255.) She delivered a detailed explanation as to each juror. The trial court's ensuing comments agreed with the prosecutor and concluded with, " *'I don't find that there has been a systematic exclusion of Mexican-Americans from this jury.* And the motion under *Wheeler* is denied.' " (*Id.* at p. 256.) Rejecting the claim that the trial court made an implied prima facie finding, the appellate court concluded the "court did not call upon the prosecutor to explain, but simply provided her an opportunity to respond to defendant's motion." (*Id.* at p. 254.) "By finding no systematic exclusion, it appears clear that the court not only did *not* impliedly find a prima facie case had been made, but to the contrary, it *expressly* found that *no* prima facie showing had been made. [Citation.] The fact that the prosecutor tried to justify her challenges even though the court did not call upon her to do so did not preclude the court's finding that there was in fact no prima facie showing in the first instance." (*Id.* at p. 256.)

Defendant says *McCaskey* is inconsistent in one aspect with *People v. Granillo* (1987) 197 Cal.App.3d 110,

which, according to defendant, implies that a trial court's subsequent statements cannot be used to determine that the trial court's initial invitation to the prosecutor did not constitute a prima facie finding. "Once the court rules a prima facie showing has been made, the 'peremptory' attribute of the challenges is lost and the focus turns to justifying the excuses on some acceptable specific basis. No longer is the court 'screening' out frivolous objections. Although the court may have second thoughts concerning whether a prima facie showing has been made, it may not return to the screening process. The sole issue then pending is the adequacy of the justifications." (*Id.* at p. 122.)

But in *Granillo,* the trial court's invitation to the prosecutor to respond was later confirmed as a prima facie finding when the trial court specifically found systematic exclusion. We have no quarrel with the proposition that second thoughts under the circumstances would have improperly put the court back into a screening mode. We do not read *Granillo* as holding that subsequent events cannot shed light on whether a vague initial invitation by the trial court to the prosecutor was intended as a prima facie finding or was merely a seeking input as to whether a prima facie showing has been made by the defense.

In *People v. Johnson* (1989) 47 Cal.3d 1194, 1217, the trial court reacted to the *Wheeler* motion by asking the prosecutor, " 'Do you wish to respond . . . ?' It then proceeded to hear the prosecutor's explanations for the use of the peremptory challenges. In *People v. Turner* [, *supra,*] 42 Cal.3d 711 at pages 718-719 . . . we concluded that such an inquiry by the trial court constituted 'at least an implied finding' of a prima facie showing." *Johnson*

did not consider the question of whether the totality of circumstances can show lack of a prima facie finding when the trial court has invited the prosecutor to "respond" or "be heard" as opposed to "explain" or "give reasons."

McCaskey held that a "reviewing court must look carefully at the circumstances faced by the trial court whenever it is asked to decide whether the trial court intended to make an implied finding that a prima facie case was established under *Wheeler*. It is clear that not every request for input from the prosecutor is intended by a trial court as a prima facie finding. The trial court may simply want input on the very question of whether a prima facie case has been established. For example, in this case the *Wheeler* motion raised the question of whether one of the challenged jurors . . . was a member of a cognizable class. It would have been imprudent, and maybe unfair, for the trial court to decide this question without providing the prosecutor an opportunity to state her observations or opinion. The trial court must be given some latitude to make inquiries to more preparedly deal with the situation before it. *Granillo* does not hold to the contrary." (*People v. McCaskey, supra,* 207 Cal.App.3d at p. 257.)

Johnson was filed by the Supreme Court on February 23, 1989. The Supreme Court denied review in *McCaskey* on April 19, 1989.

The instant matter goes *McCaskey* one better. The trial court did not ask for reasons or explanations. It merely asked the prosecutor if she wished to be heard. The prosecutor, wisely or fortuitously, gave not one word of

excuse or explanation, but attacked the preliminary question of systematic exclusion, after which the trial court specifically found no pattern of systematic exclusion. In the cases surveyed above, including *McCaskey*, the prosecutors, some eagerly, some reluctantly, gave reasons for excluding the jurors in question. It is easier to conclude that a trial court has impliedly made the prima facie finding when it takes the next step and listens to the justifications offered.

In *People v. Bittaker* (1989) 48 Cal.3d 1046, after the defense accused the prosecutor of violating *Wheeler*, the trial "court afforded the prosecutor a chance to respond – the prosecutor denied the charge – and then denied defendant's motion. [¶] Defendant argue[d] that by offering the prosecutor a chance to respond to the motion, the court in effect found that defense Counsel had made a prima facie showing of group bias, thus shifting to the prosecutor the burden to justify his challenges. We do not so interpret the judge's ruling. He did not call upon the prosecutor to explain his challenges, but to respond to the defense motion. When the judge then denied the motion, he did so on the ground that the defense had not made out a prima facie showing of group bias, not that the prosecutor had rebutted such a showing." (*Id.* at pp. 1091-1092.)

"In determining whether to infer a trial court's finding of a prima facie case under *Wheeler*, we look to the whole record, examining the court's remarks in context." (*People v. Hayes* (1990) 52 Cal.3d 577, 605, fn. 2.)

We are persuaded by *McCaskey*, fortified by *Bittaker* and *Hayes*. In context, the trial court merely gave the

prosecutor the chance to be heard. She attacked only the prima facie question and the trial court then found no systematic exclusion. The only conclusion we can draw is that the trial court did not impliedly make a prima facie finding.

Some of the cases summarized above turn on exceedingly fine points of the peculiar phrasing of the trial court's invitation and the nature of the prosecutor's response. The sad lesson is that when the trial court responds with "do you want to be heard" or "would you like to respond," the ball is in the air and can land anywhere. Here, it happens to have landed on the prosecution's side. Next time it may just as well require an automatic reversal. Such unpredictability is anything but desirable, but when vague records come to us, leaving us to in effect try to read the trial judge's mind, an unintended twist of phrase can end up the deciding factor. Strange though it seems, the case law requires us to pick at microscopic distinctions and make a call that may or may not resemble what the trial judge had in mind. It's much easier for the trial court to just say whether it is making the prima facie finding before it asks the prosecutor to respond, or if limiting the inquiry to whether a prima facie showing has been made, to say so. Any prosecutor who fails to inquire and gushes explanations when the trial court has failed to specify is unwittingly jeopardizing his or her case.

II

Attacking the search warrant, defendant attempted to present the testimony of Jamie Wolden, upon whom the

sheriff's deputies had relied for information in securing the warrant. The warrant affidavit alleged that deputies went to the Baldwin Park Police Department where Wolden was in custody for possession of C-4. Wolden told them he got the C-4 from Ferro at a golf course. Ferro claimed to have a large supply of C-4 at home which he would sell or trade for gold.

After conducting an investigation, deputies interviewed Wolden a second time. He said he had lied during the first interview. This time the story was that Ferro gave him the C-4 at Ferro's defunct chicken processing plant. Ferro kept "a lot of guns, automatic weapons, and explosives at his chicken processing plant." While there, Wolden "saw a live . . . rocket, both ends had caps on them[,]" and a kilo of cocaine. Ferro gave Wolden a sample of the cocaine, which Wolden snorted. Once, while at Ferro's home, Wolden had seen a suitcase containing $250,000 cash. He reiterated that Ferro had given him the C-4 as a sample of a larger supply Ferro would sell or trade for gold. Wolden had sold Ferro a firearm known as a "street sweeper" which he believed Ferro had then converted to a fully automatic weapon.

A relative of Wolden's said Ferro was Wolden's "old boss."

During a defense interview at the prison where he was incarcerated, Wolden said he never told police he had seen cocaine at the chicken plant, defendant never said he had C-4 for barter or sale, and Wolden did not sell a "street sweeper" to defendant. Although Wolden had been hired to help demolish the chicken plant, defendant did not supervise him and was not his boss. Wolden

claimed to have told the police he found the C-4 at the chicken plant during demolition; defendant did not give it to him and knew nothing about it. During the police interview, Wolden was suffering heroin withdrawal symptoms and the police withheld medical treatment.

The trial court ruled the testimony was admissible to attack the validity of the search warrant, but Wolden asserted his Fifth Amendment privilege. Wolden had pled guilty to possession of the smaller quantity of C-4 with which he was caught. Defendant says the trial court should have limited the scope of Wolden's testimony to the above non-incriminating details and disallowed the claim of privilege to that extent.

Assuming without further discussion that the above details were non-incriminating, we cannot say the trial court erred. "Whenever . . . proffered evidence is claimed to be privileged under [Evidence Code] Section 940, the person claiming the privilege has the burden of showing that the proffered evidence *might* tend to incriminate him; and the proffered evidence is inadmissible *unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate* the person claiming the privilege." (Evid. Code, § 404, emphasis added.) A witness need not necessarily invoke the privilege on a question-by-question basis, but can "properly invoke the privilege against self-incrimination with respect to a particular event." (*People v. Cornejo* (1979) 92 Cal.App.3d 637, 659.)

"[T]he vagaries of witnesses, especially accomplices in crimes" (*People v. Chandler* (1971) 17 Cal.App.3d 798, 805, disapproved on another ground in *People v. Hill*

(1992) 3 Cal.4th 959, 992), persuade us that putting Wolden on the stand and trying to guarantee only non-incriminating testimony was not a realistic prospect. As respondent points out, Wolden had not been charged with the large quantity of C-4 found at the chicken plant, which could have led to federal charges. The prosecutor was not required to give deference to Wolden's direct testimony, but could have cross-examined him on his knowledge of the larger quantity of explosive. The prosecutor could have attempted to show, e.g., the unlikelihood that Wolden could have found the small quantity with which he was arrested without stumbling across the larger quantity at the same site. Denying knowledge of the larger amount could thus cast doubt on Wolden's statement he found the smaller quantity of C-4, so such questions would not have been beyond the scope of the proffered testimony. The slightest faltering on Wolden's part could have led to his incriminating himself as to the larger amount, putting him in peril of charges more serious than that to which he had pled guilty. "It is a commonly known rule that no witness, even a defendant in a criminal case, will be permitted to testify concerning a matter while refusing cross-examination as to the same matter." (*People v. Williams* (1973) 30 Cal.App.3d 502, 510.)

The trial court was charged with the duty of making the assessment and reasonably concluded Wolden's testimony might incriminate him. We cannot conclude "that the proffered evidence cannot possibly have a tendency to incriminate" Wolden. (Evid. Code, § 404.)

We reject any suggestion that the trial court should have granted Wolden immunity so he could testify (*People*

v. should have done so (*People v. Sutter* (1982) 134 Cal.App.3d 806, 814).

III

David Albright was the investigator who, with defendant's trial counsel, conducted the prison interview with Wolden. At trial, defendant sought to present Albright's testimony concerning that interview as a declaration against Wolden's penal interest. (Evid. Code, § 1230.) Impliedly questioning the trustworthiness of Wolden's statements to Albright, the trial court denied the request.

"The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. [Citations.] [¶] . . . A reviewing court may overturn the trial court's finding regarding trustworthiness only if there is an abuse of discretion. [Citation.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 745.)

Excerpts of the interview show the following during questioning of Wolden (JW) by trial counsel (PS):

"JW: As to what we discussed earlier, I'll get a hold of my lawyer and if he tells me you know what you guys said was true then uh there will be no problem. [¶] PS: If Your lawyer says go ahead and do it, you would be

willing . . . [¶] JW: I would be willing to do it. [¶] PS: You'd be willing to come to court on say . . . [¶] JW: Because if that's the only thing that's you know like really threatening him to go you know, yeah I'll go ahead and testify. [¶] PS: You'd tell the jury that the substance that they found there was yours. [¶] JW: Yeah. That he didn't know about it."

"PS: If your lawyer says okay Jamie you can testify and tell the jury that it was your explosives, one of the things that you might encounter is the D.A. may ask you well okay it's your stuff. He may ask you stuff like well where did you get it. Who did you buy it from or were you . . . what would your answers be? I mean. You know what I mean. [¶] JW: I haven't thought about that. [¶] PS: Were you selling it? Or is that something You don't want to say? [¶] JW: I don't know. I mean with possession of explosives they can't get me on that charge, but now can they get me on a charge for possession with intent to sell the explosives? [¶] PS: No, I don't believe so because they don't have Ferro charged with [that] and there's certainly enough quantity to do that. And I am not so sure that there even is such a charge. There may be, but they don't have him charged with it. . . . [¶] . . . [¶] JW: . . . As long as I get to talk to my lawyer before anything goes any farther. [¶] PS: And your lawyer may say let Ferro call you as a witness. Let him put you in front of the jury, but when [defense counsel] may ask you questions, maybe your lawyer's going to tell you to take the 5th and if you do, you do. That's your right. And that's up to you and your lawyer. [¶] JW: Yeah. [¶] PS: And if he says no, go ahead and tell him it was your stuff and then do that. [¶] JW: Well if there's no repercussions that can come down

on me behind it you know I'd be more than glad to do that. Because Bob's helped me out quite a bit in the past when I needed a job or money, things like that."

"JW: Okay. Like I said I'd be more than willing to help Bob out, if I can in any way." "[] Now what, say if I went into court and did what I was going to do, could they get me on that count [the larger quantity of C-4 found at the chicken plant)? . . . [Defense counsel erroneously replied that Wolden could not be prosecuted for the chicken plant C-4 because he had already pled guilty to possession of the C-4 found on his person.]"

"PS: Okay and I just want to warn you that if you come in and say listen the truth is the stuff that was at the ranch was mine, the plant was mine, the prosecutor will probably ask you where did you get it? Who did you get it from? And for all I know the truth is hey I got it from somebody. I'm not going to tell you or I don't know who he is. I don't that, but you might . . . [¶] JW: That's something I want to discuss with my lawyer. [¶] PS: Yeah, that's what I thought. You might be confronted with questions . . . [¶] JW: Oh I'm sure I will. Because they'll want to know where the hell it came from. That was all their main concern was, was where the hell it came from. [¶] PS: Yeah. Well they said in the reports that Bob Ferro gave it to you, but . . . [¶] JW: Yeah. Then that's wrong. Because since I got your message that You wanted to see me I started thinking about how things went and like I said it was pretty hazy, you know. I do remember certain things that I said and things that I didn't say and they put a lot of stuff in here that I didn't say. [¶] PS: The things that you didn't say, are you clear about those? I mean . . . [¶] JW: As clear as I can possibly be about any

of it at that time because I was pretty spun. I hadn't had any sleep in 24 hours and I was pretty sick, but I do have a good recollection. I do have a good memory. [¶] . . . [¶] . . . There's parts of it that are foggy though. Uh but no I remember the majority of what happened. . . . "

"PS: If Bob Ferro was sitting here right now I am sure he would say thanks. [¶] JW: Tell Bob I'll do whatever I can. Let him know that. [¶] PS: And if your lawyer says it's okay you will tell the jury that was your substance . . . [¶] JW: If he says it's okay, it's on. [¶] PS: It was your stuff at the plant. [¶] JW: As long as they can't you know go yeah okay and put a new charge on me and fuck me off because like my old lady is not taking care of my kids and right now the only thing I can think of is to get out of here as fast as possible so I can take care of my kids. [¶] PS: Yeah. [¶] JW: If I was alone, hell I wouldn't give a fuck . . . [¶] PS: Yeah. [¶] JW: You know? [¶] PS: Well I want you to understand that when you come into court and you say it's my stuff I want that to be the truth as long as it doesn't come back to hurt you. [¶] JW: Yeah. It will be."

"PS: Thank you very much for helping us. [¶] JW: Yeah. If my lawyer says it's okay then you know you can tell Bob I'll be there for him."

Throughout the interview, Wolden unequivocally accused the police of lying about many things, including his statements. But, as noted by the trial court, he never unequivocally admitted the chicken plant C-4 was his. The interview justifies a conclusion that Wolden was less than sincere about his proffered testimony, compromising

its trustworthiness. The trial court concluded it was "just not satisfied that [Wolden] made these statements with the realization that they could really be and would be potentially used against him." We cannot say the trial court erred. The evidence led to the reasonable conclusion that Wolden "wanted to aid his friend at little risk to himself, and thus the statement was insufficiently trustworthy." (*People v. Frierson, supra,* 53 Cal.3d at p. 745.) We find no abuse of discretion.

IV

Defendant attacks the sufficiency of the evidence. The jury was instructed that one of the elements was that defendant "recklessly or maliciously" possessed the explosive.

We first discuss the question of malice. Defendant, a Cuban, had become involved in an anti-Castro group. He told sheriff's deputies "his goal was to train young Mexican men, and he conducted this training at the chicken processing plant. . . . And his intentions were to train these young men and take them down to Cuba to overthrow the Castro government. [¶] . . . [¶] . . . He also used [the chicken plant] as a movie studio to make training films to assist [himself] and others in training these young men. . . . "

Defendant argues possession of the C-4 could not have been malicious because even if "a wish to vex, annoy or injure another person, or an intent to do a wrongful act" were demonstrated, it was directed at

Cuba, far removed from California. Defendant says California thus has no jurisdiction, since any intent demonstrated was for an act outside the state. Defendant cites no authority for the proposition that if one possesses explosives in California intending to do harm to individuals outside the state, no violation of Penal Code section 12303.2 is shown. We reject the notion, which could, for example, lead to the result that one who possessed explosives in California and placed them on a plane with a timer to blow up over Kansas, would not have maliciously possessed the explosives. The evidence here could reasonably have led the jury to conclude that the explosive was maliciously possessed for the purpose of playing some role, even if only for training purposes, in the ultimate infliction of injury on other people. That the injury was to be inflicted outside our jurisdiction is of no moment.

In any event, "[i]n view of the inherently dangerous nature of an explosive substance and the public places in which the statute prohibits possession, we do not interpret 'maliciously' within the terms of the statute to require an actual intent to physically injure, intimidate or terrify others." (*People v. Heideman* (1976) 58 Cal.App.3d 321, 335, fn. omitted.)

The question of recklessness poses a slightly more vexing problem. C-4 is a putty-like substance ordinarily detonated with a blasting cap. No blasting caps were found at the chicken plant. The amount of C-4 found at the chicken plant was not enough to pose a danger to surrounding buildings. (Some of this information was brought out by way of a motion for new trial.) Tables dealing with C-4 recommend 60 feet as a safe distance

from unbarricaded highways and 140 feet from inhabited buildings. The nearest street to the chicken plant was 89 feet distant. The nearest inhabited building was 166 feet away. Thus, argues defendant, the explosive could not be detonated, but even if it could, it posed no danger to the surroundings.

The evidence at trial showed several homes in the vicinity of the chicken plant. Not far away was a school yard. Defendant rented an area used for storage from a church located "right here around the corner." Although C-4 had been used in Vietnam by soldiers who would light it with a match to "cook things or heat things . . . warm something such as food, boiling water," the "one thing You didn't want to do . . . is strike it with any object because if you did, it would detonate" if struck while burning. A witness testified that although hitting unburning C-4 with a hammer would not be expected to cause an explosion, "it is so unpredictable, explosives are so unpredictable that I would certainly not walk up to an explosive and hit it with a hammer." The witness went on to admit that if "if [C-4] were shot with a bullet it wouldn't explode. It is designed that way because it is carried by military personnel. But I still would treat it with the greatest respect." But, he said, "[t]here is a possibility that it will detonate if it's set on fire. And if a heavy pressure were applied to it, it could detonate without the use of a blasting cap. [¶] Normally speaking, for safe operation you need a blasting cap to detonate C-4. [¶] . . . [¶] . . . If it were set on fire and pressure applied to it, it would detonate. It could detonate."

The witness testified that "in Vietnam there was more than one case that I investigated as a military policeman

. . . where individuals [who] had set fire [to] C-4 for purposes of cooking weren't aware of the dangers of it and attempted to stomp it out" and it detonated. The witness reiterated that pressure *and* burning were necessary to detonate C-4 without a blasting cap.

The jury was thus confronted with an abandoned chicken plant under demolition, in the vicinity of homes, a church, and a school. It takes no imagination to picture children trespassing onto the abandoned chicken plant, rummaging through the premises, coming across the putty-like C-4, and deciding to play with it. Seeing if the substance will burn and then trying to stomp it out is completely within the realm of foreseeability. We need not try to come up with a variety of possible scenarios. History is full of children having been taken by their curiosity into perilous circumstances. Leaving an explosive substance lying around under these circumstances is more than sufficient to justify a jury finding of recklessness.

V

Defendant complains of his trial counsel's performance in several regards.

Counsel brought a motion to suppress, but failed to attack the legality of defendant's arrest. Defendant says any statements of his should have been suppressed because the search warrants did not contain permission to arrest him (*People v. Ramey* (1976) 16 Cal.3d 263) and because police violated Penal Code knock-notice provisions when they entered his home, where defendant was first encountered and detained.

On the first point, "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home. Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. [¶] Because it was lawful to require [defendant] . . . to remain in the house until evidence establishing probable cause to arrest him was found, his arrest . . . [was] constitutionally permissible." (*Michigan v. Summers* (1981) 452 U.S. 692, 704-705, fns. omitted.) The result is no different because the contraband establishing probable cause for arrest was found during a contemporaneous search at another location, the chicken plant.

As to the knock-notice argument, defendant testified he heard nothing before the sound of the door breaking. But his wife testified she knew the police had come "[b]ecause they arrived shouting that it was the police and knocking down the front door." We cannot fault trial counsel for bringing a motion that not only would surely have been denied, but would have had to put the lie to the wife's testimony in order to be considered. Defendant's failure to hear the announcement is meaningless in light of his wife's keener observation.

Pointing out that trial counsel presented expert witnesses at the new trial motion as to recklessness of possession of the C-4, defendant complains he should have done so at trial. As respondent points out, the trial

defense was that defendant did not possess the C-4, but that it belonged to Wolden. And counsel presented a witness who testified that C-4 is stable, needs a blasting cap for detonation, will burn, but if one tries to stomp it out, the probable result would be to "burn your foot," not cause a detonation. He testified that an "improvised explosive device" could be made from common household items such as "[g]asoline, ammonium, brake fluid, aspirin. Chlorine, such as pool chlorine. Concentrated chlorines, acids." The implication of this testimony was that the C-4 was no more recklessly possessed than such common items. Under the circumstances, it appears trial counsel pushed the recklessness issue as far as he thought prudent considering his client denied possession in the first place. We cannot quarrel with the reasonableness of the tactic.

Defendant faults his trial counsel's performance for failing to introduce Wolden's interview during the suppression motion. In addition, says defendant, his trial counsel should have disqualified himself and taken the stand to testify to Wolden's interview. As discussed previously, the untrustworthiness of the interview rendered it inadmissible at trial. We see no reason why a different conclusion should apply to the suppression motion. Counsel's performance in this regard was not deficient.

Defendant says his trial counsel should have made a motion for directed verdict on the basis the evidence failed to prove the possession of C-4 was malicious. As previously discussed, the evidence in this regard was sufficient to convict and to withstand appeal. A motion for directed verdict would have been properly denied. We reject defendant's contention.

" 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id.* at p. 217.)

"Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission. [Citation.]" (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

Counsel is not required to make futile motions or indulge in idle acts in order to appear competent. (*People v. Knight* (1987) 194 Cal.App.3d 337, 346.)

Defendant has shown neither deficient performance nor prejudice.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

ORTEGA, J.

We concur:

SPENCER, P.J.

MASTERSON, J.

APPENDIX B

Second Appellate District, Division One, No. 5070286
S037716

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK
(Filed Mar. 23, 1994)

THE PEOPLE, Respondent

v.

ROBERT FERRO, Appellant

Appellant's petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

/s/ Lucas
Chief Justice